

MESA WIND DEVELOPERS

IBLA 88-136

Decided February 7, 1990

Appeal from a decision of the Area Manager, Indio Resource Area Office, California, Bureau of Land Management, denying a request to blade an access route to wind energy facility right-of-way CA-11688-A; offering to allow limited use of that access route; and conditioning such offer on reclamation and restoration of a portion of right-of-way CA-13980.

Affirmed in part; set aside and remanded in part.

1. Federal Land Policy and Management Act of 1976: Rights- of-Way-- Rights-of-Way: Generally--Rights-of-Way: Conditions and Limitations-- Rights-of-Way: Federal Land Management and Policy Act of 1976-- Rights-of-Way: Nature of Interest Granted

When Congress has enacted legislation to provide for rights-of-way for particular purposes, authorization to use public land for such purposes must be consistent with that legislation. Under the right-of-way provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982), and its implementing regulations, 43 CFR Part 2800, authorization to use public land for a permanent access road to a wind energy park can only be accomplished through the issuance of a right-of-way grant. Approval of a plan of operations for a wind energy facility right-of-way does not constitute the authorization for an access road, which is not located on the lands described in the wind energy facility right-of-way grant.

APPEARANCES: Keith M. Crouch, Esq., Jeffrey B. Groy, Esq., Joyce A. Vigil, Esq., Denver, Colorado, for appellant; Burton J. Stanley, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Mesa Wind Developers (Mesa) has appealed from the November 3, 1987, decision of the Area Manager, Indio Resource Area Office, California, Bureau of Land Management (BLM), (1) denying Mesa's request to blade a

dirt road (designated by Mesa as the Lazar Route) in a canyon in the S½ S½ of sec. 33 and SW¼ of sec. 34, T. 2 S., R. 3 E., San Bernardino Meridian, California, providing access to Mesa's wind energy facility right-of-way CA-11688-A; (2) offering to allow limited use of the Lazar Route; and (3) requiring Mesa, as a condition of authorization of limited use of the Lazar Route, to restore and reclaim completely the previously constructed portion of road right-of-way CA-13980. Mesa contends that BLM had previously authorized permanent use and maintenance of the Lazar Route. 1/

The relevant facts are as follows. On January 26, 1983, BLM issued right-of-way grant CA-11688-A to PanAero Corporation for a wind energy facility to include wind turbine electric generators. The right-of-way, amended on August 16, 1983, described two sites: (1) the Alta Mesa site, consisting of 58 acres in sec. 4, T. 3 S., R., 3 E., San Bernardino Meridian; and (2) the North White Water site, consisting of approximately 382 acres in secs. 27, 33, 34, T. 2 S., R. 3 E., San Bernardino Meridian. The terms of the grant provided that prior to commencement of construction the grantee would submit a plan of operations.

On May 24, 1983, PanAero submitted its plan of operations in which it proposed that its main access road to the facility be the Lazar Route. That route, which formed a portion of the southern boundary of the Whitewater Canyon Wilderness Study Area (WSA), was not within the boundaries of CA-11688-A. In June 1983, PanAero filed a right-of-way application (CA-13980) requesting, inter alia, approval of the Lazar Route as access to the facility. On August 15, 1983, BLM approved the plan of operation. Thereafter, on April 12, 1984, BLM issued right-of-way CA-13980 to PanAero. That right-of-way grant, which also authorized a 12 kV transmission line, described two access roads, as follows:

| | |
|--------------------------------------------|-------------------------------------------------------------------------------------------|
| Project Description | : Two access roads: 20' x 6500' & 20' x 2800' |
| Land Description | : T.2 S., R. 3 E.,S.B.B.M. Portion of S½ S½ of Section 33, Portion of S½ S½ Section 34 |
| Permitted Use by Holder Maintenance of the | : Construction, Operation, and above described project. |

Right-of-way grant CA-13980 was amended on two occasions, August 14 and September 25, 1984, to authorize the installation, operation, and maintenance of additional roads connecting with those described in the

1/ The question of whether the Lazar Route might be an R.S. 2477 right-of-way has not been raised by Mesa. See Sierra Club, 104 IBLA 17 (1988). Nor have we addressed it in this decision.

original grant. ^{2/} Road right-of-way grant CA-13980, as amended, is referred to by the parties as the Metro Water District Route, since portions of the right-of-way parallel a Metro Water District aqueduct. BLM approved the assignment of rights-of-way CA-11688-A and CA-13980 from PanAero to Mesa on June 26, 1984, and January 18, 1985, respectively.

In early 1985, Mesa sought permission from BLM, in accordance with Stipulation B.10.f. of Exhibit A of right-of-way grant CA-11688-A, to grade the Lazar Route. ^{3/} In a letter dated April 1, 1986, the BLM Area Manager refused to grant permission stating:

The northern edge of the original trail serves as the southern boundary of the Wilderness Study Area. Past maintenance work by MWD [Mesa Wind Developers] has widened the trail so that it encroaches into the WSA. Therefore, we cannot allow any further grading work at this time.

As you know this particular route was meant only as temporary access until you received a more permanent route. That permanent access route was approved on August 14, 1984. The majority of that road has been constructed. We suggest that you concentrate your efforts on completing the permanent access road so we can close and rehabilitate the temporary access route.

Mesa clearly was under the impression that BLM had authorized use of the Lazar Route as permanent access to the wind energy facility and in a letter to BLM dated October 17, 1986, it detailed its understanding of the history of the authorization of the use of the Lazar Route. In response thereto, on November 12, 1986, the Area Manager issued a decision styled "Authorization Rescinded." Therein, she stated that improvements of the Lazar Route had resulted in infringements on the WSA in direct violation of the Interim Management Policy and Guidelines for Lands under Wilderness Review (Dec. 12, 1979). She acknowledged that she had given oral authorization in 1984 to use the Lazar Route, but that such use was to be temporary in nature. She concluded that "[i]n view of the above violation, and the fact that use of the subject trail [Lazar Route] is no longer considered temporary in nature, authorization to use said trail is herewith rescinded effective 120 days from the date of this decision." Mesa filed an appeal from that decision, and upon a motion for remand filed by BLM, this Board, by order, vacated BLM's decision and remanded the case for further action. Mesa Wind Developers, IBLA 87-233 (Feb. 11, 1987). Efforts by Mesa and BLM to resolve their differences were unsuccessful, and BLM issued the decision now under appeal. ^{4/}

^{2/} The August 1984 amendment authorized a road 4,460 feet in length and 20 feet wide in the NW¹/₄ of sec. 10, T. 3 S., R. 3 E., San Bernardino Meridian. The September 1984 amendment approved a revision of the road location in sec. 10 changing it from the NW¹/₄ to the N¹/₂ N¹/₂, E¹/₂ SE¹/₄ NE¹/₄.

^{3/} That stipulation provides that "[g]rantee shall not blade existing roads unless approved by the Authorized Officer." (Emphasis in original.)

^{4/} We note that in neither her Nov. 12, 1986, decision nor in the decision presently under appeal did the Area Manager inform Mesa of its right

Mesa contends on appeal that the Lazar Route always has been the permanent, primary access route to the facility and that fact was stated in the plan of operations approved by BLM. It asserts that right-of-way CA-13980, as amended, and the East Face Route (CA-16404), granted by BLM on October 3, 1984, were never utilized as alternative routes because it could not secure the permission of all private land owners in order to use CA-13980, as amended, and CA-16404 was not suitable for use by construction equipment.

In its statement of reasons, Mesa includes a lengthy recital of its understanding of the history of this matter, disputing in part the narra-tion set forth in BLM's decision. BLM counters with a statement from the Area Manager, but asserts that "the only legal issue involved in this appeal is whether appellant ever acquired any right to use the Lazar Route from the Bureau of Land Management" (BLM's Brief at 1). In responding to BLM, Mesa requests a hearing, stating that the issue is not whether it has the right to use the Lazar Route, arguing that its right to use that route was confirmed in the decision, but charging that "the only issue before the [Board] is whether that permanent right of use also includes a maintenance component" (Motion for Request of Hearing at 2 (emphasis supplied)). BLM contends that its decision only indicates a willingness to authorize limi-ted use of the Lazar Route and does not constitute an authorization in itself.

[1] Although Mesa believes that BLM already has authorized permanent use of the Lazar Route, BLM does not acknowledge this to be true. Thus, we will examine whether or not BLM properly authorized permanent use of the Lazar Route by Mesa. Courts have recognized that when Congress has enacted legislation to provide for rights-of-way for particular purposes, authorization to use public land for such purposes must be consistent with that legislation. Utah Power & Light Co. v. United States, 243 U.S. 389 (1917); Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir.), cert. denied, 411 U.S. 917 (1973). The relevant legislation in this case is the right-of-way provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1982). Under regulations implementing those provisions, 43 CFR Part 2800, authorization to use land for the purposes contemplated by appellant can only be accomplished through the issuance of a right-of-way grant or a temporary use permit. The question is, therefore, whether BLM issued a right-of-way or temporary use permit authorizing use of the Lazar Route for access to the wind energy facility. We conclude that it did not.

First, there is no evidence in the record that Mesa applied for or that BLM issued a temporary use permit for the Lazar Route. Moreover, it does not appear that a temporary use permit would be appropriate given appellant's intended use of the road as a permanent access route.

fn. 4 (continued)

to appeal her actions. That was clearly improper. Nevertheless, in each instance Mesa filed a timely appeal and, therefore, was not prejudiced by the Area Manager's error.

Next, we turn to rights-of-way grants CA-11688-A and CA-13980 to determine if either approved permanent use of the Lazar Route. Right-of-way grant CA-11688-A itself contains no language that could be construed as granting authorization for use of the Lazar Route, which is located outside those lands described in the grant, and, in fact, appellant does not argue that the grant itself authorizes use, but that BLM's approval of the plan of operations filed in connection with CA-11688-A, constituted authorization to use the Lazar Route.

In Desert Survivors, 96 IBLA 193 (1987), the Board held that the approval of a mining plan of operations by BLM did not constitute the authorization to convey water across the public lands to the mining claims. We noted that no FLPMA right-of-way application for conveyance of water had been filed, and we reversed BLM's approval of the plan and remanded to allow the mining claimant to file a right-of-way application and for BLM to prepare an environmental assessment.

In the present case, prior to approval of the plan of operations, Mesa filed right-of-way application CA-13980 seeking approval to utilize the Lazar Route, but the approval of the plan of operations made no mention of that application. Approval of the plan for right-of-way CA-11688-A could not authorize utilization of public lands other than those described in that right-of-way grant. Thus, where an access road is not specifically designated by description in a right-of-way grant, approval of a plan of operations for that right-of-way cannot constitute authorization for use of such a road. 5/

Mesa also argues, in the alternative, that BLM's issuance of CA-13980 included authorization to use the Lazar Route. Mesa asserts that in February 1984, prior to approval of CA-13980, it filed with BLM a written amendment of the CA-13980 application seeking, in addition to the Lazar Route, "a road along the western edge of Section 04 [T.3 S., R.3 E.] that will join the existing road in Section 33 [T.2 S., R. 3 E.] as indicated on the attached map," and also "a road in the southwest portion of Section 34 [T. 2 S., R. 3 E.] that will access Section 04 [T. 3 E., R. 3 E.] as indicated on the attached map" (Statement of Reasons at 6). 6/

5/ Even if we were to construe approval of the plan of operations to constitute an amendment to right-of-way CA-11688-A so that it would include the right to use the Lazar Route as an access road, the stipulation quoted above in footnote 3 requires BLM approval of the blading of existing roads. BLM may properly deny such permission where such activity would impair the suitability of land within a wilderness area for designation as wilderness. 6/ The case file forwarded to the Board from BLM did not contain this letter nor the referenced map. In an order dated June 27, 1988, in which we took Mesa's request for a hearing under advisement, we noted that documents which would have preceded issuance of right-of-way grant CA-13980 were not part of the record in this case, and we specifically directed BLM to "provide the Board, within 30 days of receipt of this order, with the right-of-way application, any associated environmental review documents, the complete right-of-way grant and any other pertinent documents which were prepared or submitted in connection with processing right-of-way application CA-13980."

BLM issued CA-13980 on April 4, 1984, for two roads, described supra. Mesa argues that one of those roads was the Lazar Route. We think it clear, however, that the two access roads described in the April 4, 1984, request did not include the Lazar Route. BLM points out that the length of the Lazar Route (approximately 5,280 feet) does not correspond to the length of either of the roads specified in that right-of-way. The 6,500-foot road runs through the length of the W $\frac{1}{2}$ W $\frac{1}{2}$ of sec. 4 and into the S $\frac{1}{2}$ SW $\frac{1}{4}$ of sec. 33 before it enters the Alta Mesa site of CA-11688-A. The 2,800-foot road starts from the east side of the Alta Mesa site in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of sec. 4, enters the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 33 and connects with the North Whitewater site of CA-11688-A in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of sec. 34. 7/ Therefore, we must conclude that CA-13980 did not authorize use of the Lazar Route.

Appellant also points to a letter dated December 21, 1984, from the BLM Area Manager to Ticor Title Insurance Company, in which the Area Manager referenced some maps and certified that the roads shown thereon, including CA-13980, were accurate, and she stated further that "I certify that those roads so labeled are easements to the properties to be used for construction and operation of wind turbines by Mesa Wind Developers." One of the roads drawn on one of those maps, and designated as CA-13980, is the Lazar Route. Appellant charges that this letter establishes that CA-13980 authorized use and maintenance of the Lazar Route. We disagree. As discussed above, CA-13980, as issued, or as amended, did not include the Lazar Route. Thus, the Area Manager's certification of the road described above clearly was in

fn. 6 (continued)

BLM did not submit any documentation in response to that order until Oct. 6, 1989. A cover memorandum dated Oct. 3, 1989, listed attached documents as (1) the right-of-way application for CA-13980, dated June 2, 1983; (2) the Aug. 1, 1983, environmental assessment analyzing CA-13980; (3) the original right-of-way grant for CA-13980, issued on Apr. 12, 1984; (4) documents pertaining to two subsequent amendments of CA-13980; and (5) documents relating to the assignment of CA-13980 from PanAero to Mesa. Despite that representation, an environmental assessment analyzing CA-13980 was not included. The forwarded document bearing an Aug. 1, 1983, date was a copy of a finding of no significant impact relating to the environmental assessment for the plan of operations for CA-11688-A. Moreover, no documents relating to CA-13980 which predated issuance of that right-of-way were provided, except a copy of the application itself.

For some unexplained reason, BLM has failed to provide us with a complete record in this case. Nevertheless, that is not a basis for reversing BLM's decision to refuse to allow blading of the Lazar Route. If BLM had properly authorized appellant to use the road, appellant would have some written document in which such authorization was granted. Appellant's failure to produce such a document conclusively resolves the issue of authorization.

7/ There is no question that if BLM had included with the issuance of CA-13980 a map showing the location of the two roads authorized by that grant, confusion over whether or not that right-of-way included the Lazar Route could have been avoided.

error. Her certification could not and did not constitute approval of a right-of-way in the manner required by pertinent statutory or regulatory provisions.

In light of the fact that some written authorization is required, we fail to see how oral testimony taken at a hearing could assist our disposition of this matter. Whatever opportunity BLM may have provided for appellant to use the Lazar Route (and there appears no question from the record that the Area Manager did, in fact, communicate to Mesa and/or its predecessor that the Lazar Route could be used for some indeterminate period of time for access to the wind energy facility), no enforceable rights were created against the United States if BLM issued no right-of-way or temporary use permit. See Utah Power & Light Co. v. United States, supra. Accordingly, appellant's request for a hearing is denied. Having found as a matter of law that BLM never properly authorized appellant to use the road, we can only conclude that BLM properly denied appellant permission to blade it.

BLM also stated in its decision that "this office is willing to authorize you limited use of the Lazar Route. This limited use authorization would specifically not allow any road maintenance activities because of the above-cited problems with past and future WSA impairment." In addition, the BLM decision provided that authorization of limited use of the Lazar Route is conditioned on "the requirement that the already-constructed portion of the Metro Water District Route be put to bed" by complete reclamation and restoration.

It is unclear what form BLM intends such "limited use authorization" to take. As stated above, official authorization must be in the form of a right-of-way or temporary use permit. Moreover, counsel for BLM states at page 2 of BLM's Brief that the State Director personally examined the Lazar Route; determined that it impacted on the WSA; and instructed counsel "to defend the Area Manager's decision refusing to grant appellant any further right to use that portion of the Lazar Route located on public land." The problem with that statement is that the Area Manager's decision only precluded blading the Lazar Route; it did not refuse to grant any further right to use the Lazar Route. In fact, the Area Manager expressly stated that under certain conditions, BLM would authorize further use of the road. Thus, the record is confusing concerning BLM's future intentions regarding appellant's use of the Lazar Route. For that reason, we set aside that part of BLM's decision offering limited use of the Lazar Route and conditioning such use on restoration and reclamation of "the already-completed portion" of the Metro Water District Route, and we remand the case to BLM to make its intentions clear to appellant regarding use of the Lazar Route. If BLM authorizes use of the Lazar Route, it must do so in writing in the form of a FLPMA right-of-way or temporary use permit. Also, it should consider appellant's assertion that at least part of the Metro Water District Route is necessary for maintenance of the 12 kV transmission line.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and set aside and remanded in part.

Bruce R. Harris
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge